No. 1090

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, ET AL., *Petitioners,*

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, AND PAUL PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, SUCCESSOR IN OFFICE TO CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WALTER F. BROWN
DURELL CAROTHERS
ATTORNEYS FOR THE PETITIONERS, D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, AND SPENCER J. SCOTT, MORIN M. SCOTT, ATTORNEY IN FACT FOR SPENCER J. SCOTT, LEE PRICE AND D. M. CAROTHERS, COMPOSING THE CO-PARTNERSHIP ALLRIGHT PARKING SYSTEM, LIMITED.

TEXAS CO., HOUSTON

No.....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Hon. Supreme Court of the United States:

Your petitioner, D. M. Carothers, doing business as Allright Auto Park, respectfully petitions this court to review on writ of certiorari a decision and decree of the United States Circuit Court of Appeals for the Fifth Circuit, hereinafter referred to as the Circuit Court of Appeals, rendered on December 13th, 1945, upon which petition for rehearing duly filed was denied on January 10th, 1946, in a certain cause styled Chester Bowles, Administrator, Office of Price Con-

trol, Appellant and Cross-Appellee, v. D. M. Carothers, doing business as Allright Auto Park, et al, Appellees and Cross-Appellants (and Reverse Title), in so far as said decision and decree affects him.

Also your petitioners, Spencer J. Scott, Morin M. Scott, Attorney in Fact for Spencer J. Scott, Lee Price and D. M. Carothers, composing the limited partnership, Allright Parking System, Limited, respectfully petition this court to review on certiorari the said decision and decree in so far as it affects petitioners last named.

After the rendition of the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this case, and the denial of the rehearing therein, Hon. Chester Bowles ceased to hold the office of Administrator, Office of Price Control, and the Hon. Paul Porter is now his successor in office and duly appointed, qualified and acting Administrator, Office of Price Control. Petitioners pray that this court permit the cause to be continued and maintained against the Honorable Paul Porter, successor in office to the Honorable Chester Bowles, as such Administrator, and respectfully represent that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

Statement of the Matter Involved.

The Administrator brought this suit in the District Court of the United States for the Southern District of Texas, hereinafter referred to as the trial court.

The relief sought against petitioner D. M. Carothers, doing business as Allright Auto Park, was as follows:

2. For a permanent injunction against the Defendant D. M. Carothers, individually restraining him from charging, demanding and receiving rates for parking service at any establishments now operated or that may hereafter be operated by him in excess of the Maximum Legal rates provided by Maximum Price Regulation No. 165.

3. For a further permanent and mandatory injunction against the Defendant D. M. Carothers, individually requiring him to immediately and forthwith compute his maximum prices for the "lock and park" service now offered by him, under the provisions of Section 1499.102(c) of said Regulations; and to file said computation on the form provided therefor with the Houston District office of the Office of Price Administration for proper review and examination by said office and that he be further required by order of this court to forthwith comply with said Section of said Regulation as to all other establishments at which said service may be offered which may or shall be acquired by him in the future.

4. That the Defendant, D. M. Carothers individually be permanently enjoined from violating Maximum Price Regulation No. 165 in any and all respects.

5. For costs of suit and for general relief. (R. 13-14.)

The relief sought in paragraphs 2 and 4 was denied and that sought in paragraph 3 was granted, to which

action of the trial court in granting the relief prayed for in paragraph 3 petitioner D. M. Carothers took due exception (R. 47).

The relief sought by the Administrator against Spencer J. Scott, Lee Price, Morin M. Scott, Attorney in Fact for Spencer J. Scott, and D. M. Carothers, composing the limited co-partnership Allright Parking System, Limited, was as follows:

1. For a permanent injunction restraining the Defendants D. M. Carothers, Spencer J. Scott, Lee Price and Morin M. Scott, Attorney in Fact for Spencer J. Scott, their employees and representatives from demanding, receiving or using a rate for the service of parking automotive vehicles in the lot at 1014 Main Street in Dallas, Texas, or any other parking lots now or hereafter operated by them, in excess of the maximum rates provided for and established under said Maximum Price Regulation No. 165, as amended; and further restraining said Defendants from violating said Maximum Price Regulation in any other respect.

5. For costs of suit and for general relief. (R. 13-14.)

This relief was denied by the trial court (R. 47), except that one-half of the costs were taxed against "defendant," not indicating which one (R. 47).

The Administrator appealed from the judgment as a whole to the United States Circuit Court of Appeals for the Fifth Circuit (R. 48) and petitioners, who were defendants in said suit, appealed to the United States Circuit Court of Appeals for the Fifth Circuit from those portions of the judgment which were adverse to them (R. 49).

On December 13th, 1945, the United States Circuit Court of Appeals for the Fifth Circuit rendered a judgment and decision in said cause whereby it was ordered and adjudged by said court that the judgment of said District Court in this cause to the extent that it granted injunctive relief to the Price Adminisrator should be affirmed; and to the extent that it denied him injunctive relief that it should be reversed; and that this cause should be remanded to the District Court for proceedings not inconsistent with the opinion of the said Circuit Court of Appeals (R. 66). Petition for rehearing was duly filed by all of your petitioners in said cause and on January 10th, 1946, said petition for rehearing was denied by said Circuit Court of Appeals (R. 86).

The injunctions were sought under Section 205(a) of the Emergency Price Control Act (50 U.S.C.A. War Appendix Section 925), which reads as follows:

> "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

There was no evidence that D. M. Carothers, doing business as Allright Auto Park, had charged in excess

of the alleged ceiling prices on any of the ten lots in Houston, Texas, upon which it was alleged that maximum prices had been fixed by the Administrator, or that he was about to do so. On the contrary, it was admitted that he was complying with all alleged ceilings on these lots (R. 36) and the trial court so found (R. 43). There was no finding by the trial court that he was about to charge in excess of the alleged ceilings on these lots, and no request by the Administrator for any such finding. The Administrator did not complain of this finding of compliance nor did he contend that the trial court should have found that D. M. Carothers, doing business as Allright Auto Park, was about to charge in excess of any alleged ceiling on any lot operated by him or to engage in any act or practice which would constitute a violation of any provision of Section 4 of said Act in regard to these ten lots.

The trial court correctly denied the injunction sought as to the ten lots but the Circuit Court of Appeals reversed the judgment of the trial court to the extent that the trial court denied the injunction as to these ten lots, and this action of the Circuit Court of Appeals is assigned as error in this petition. This action on the part of the Circuit Court of Appeals is wholly unauthorized by the Act and in clear violation thereof.

The only reason given by the Circuit Court of Appeals for this action was that Carothers expected to appeal to the Emergency Court of Appeals for relief from the order specifying the ceilings on these ten lots; that compliance with the order therefore was

not a willing compliance; and that it was the duty of the trial court to single him out and issue a blanket injunction against him on any lots then operated by him or that might thereafter be operated by him requiring him to correctly construe and comply with all orders theretofore made or which might thereafter be made by the Administrator. Such action by the Circuit Court of Appeals was clearly wrong and unduly oppressive. It is assigned as error in this petition. The Act gave Carothers the right to seek relief in the Emergency Court of Appeals on any order that might be made by the Administrator. It did not authorize any court to penalize him or outlaw him because he expressed an intention to avail himself of that right. To penalize a citizen and visit him with dire consequences because he sees fit to avail himself of a right given by Congressional Act would make mockery of the right guaranteed, would violate the most elementary principles of justice, and would result in a destruction of the fundamental liberties of the citizen. The rule laid down has no basis in any reported case and should not be permitted to stand.

Under the decisions of the Supreme Court of the United States blanket injunctions, such as those sought by the Administrator and denied by the trial court, should never be granted. The following quotation is taken from the opinion of the Supreme Court in *New York N. H. & H. R. Co. v. Interstate Commerce Commission,* 200 U. S. 361:

> "The contention, therefore, is that, whenever a carrier has been adjudged to have violated the Act to regulate commerce in any particular, it is

the duty of the court, not only to enjoin the carrier from further like violations of the Act, but to command it in general terms not to violate the Act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning his specific violation of the Act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Company v. United States,* 196, U. S. 375, 49 L. Ed. 5118, 25 Sup. Ct. Rep. 276. * * * The requirement of the Act to regulate commerce that a court shall enforce observance of a statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such general character as would be a violation of the most elementary principles of justice. * * * To accede to the doctrine relied upon would compel us under the guise of protecting the freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

The following quotation is from 28 Amer. Jur., 473:

"If the wrongs complained of and against which injunctive relief is sought are alleged violations of a statute in certain particulars, the decree may restrain the defendant from further like violations of the Act, but should not enjoin in general terms violations of the Act in the future in any particular, because an injunction of such general character would be violative of the elementary principles of justice, in that it would compel the defendant thereafter to conduct himself and his business under the jeopardy of pun-

ishment for contempt for violating a general injunction."

Under the express terms of Section 205(a) of the Act the injunction, if any, must be specific and must only enjoin the engaging in some definite act or practice in which the evidence affirmatively shows the defendant has engaged or is about to engage. The Circuit Court of Appeals has decreed in this case that the trial court's denial of the blanket injunction sought was error, and has ordered that the judgment of the trial court to the extent that it denied this prayer for the blanket injunction should be reversed and remanded. This ruling is assigned as error in this petition and the error is clearly of a most harmful nature.

The order specifying the ceilings on the ten Houston lots showed on its face that it was not "an order of general force and effect" (R. 15-16), and Congress gave the Administrator authority to fix ceilings on commodities only by orders "of general force and effect" (50 U.S.C.A. Appendix Section 902 (a)). The Circuit Court of Appeals held that even though the trial court is of the opinion that an order of the Administrator is void and unauthorized by Congress, and even though the order is in fact clearly void and unauthorized by Congress, nevertheless as a court of equity the trial court must lend its aid and issue a mandatory injunction requiring obedience to the void and unthorized order on penalty of contempt. This holding is assigned as error in this petition. It is clearly erroneous and in conflict with the decisions of

other Circuit Courts of Appeals. See *Bowles v. Meyers,* 149 Fed.2d 440, and *Bowles v. Nu-Way Laundry Co.,* 144 Fed 2d 742, 746.

In the opinion of the Circuit Court of Appeals in the case at bar the Circuit Court of Appeals says in footnote No. 1:

"After entry of the judgment in this case the Emergency Court of Appeals sustained the validity of the Regulation as applied to defendants' Dallas operations." This is not an accurate statement of the result of the decision. The operations in Dallas were the operations of a limited partnership, Allright Parking System, Limited, in which Carothers was one of three partners. The Emergency Court of Appeals was without jurisdiction to determine whether the partnership had or had not engaged in any act or practice which violated Maximum Price Regulation No. 165. Its jurisdiction was limited to determining whether M.P.R. 165, in so far as it included parking, was authorized by the Act. (See *Marlene Linens v. Bowles,* 144 Fed. 2d 874.) The Emergency Court of Appeals held in the Allright Parking System case (1) that prices charged for space rental for parking plus other services in connection therewith were within the coverage of the Act and subject to control by the Administrator; (2) that prices charged for space rental for parking without other services rendered in connection therewith were not within the coverage of the Act or subject to control by the Administrator; and (3) that M.P.R. No. 165 covered charges for space rental plus other services in connection therewith and did not cover space rental without such other services and that

it was therefore valid, for which reason the petition was dismissed.

In the case at bar the Administrator had the burden of proving that Carothers was furnishing space rental plus services in connection therewith and charging therefor in excess of the prices legally fixed therefor by the Administrator. It was stipulated on the trial that Carothers was merely furnishing space rental without any services in connection therewith (R 8-9); the court so found (R. 41); and this fact finding of the court is not attacked in any way. It follows that the trial court did not err in denying the injunction, there being no basis in the pleadings, the evidence or the findings of fact for the rendition of any other judgment, and that the Circuit Court of Appeals was in error in reversing the trial court's judgment in this respect. This is one of the errors assigned in this petition.

Another reason why the trial court's judgment in so far as it denied injunctive relief should not be disturbed is this: The relief sought against Carothers is that he be enjoined from charging prices in excess of the maximum legal rates provided by Maximum Price Regulation No. 165, and that he be permanently enjoined from violating M.P.R. 165 in any and all respects (R. 13-14)). On July 1st, 1944, before this case was tried in the trial court, the Administrator amended M.P.R. 165 and re-designated it R.M.P.R. No. 165 (services). 8 F.R. 7439 et seq. In that amendment he repealed entirely 1499.101(c) (4), the section specifying services in connection with parking, and he also provided that storage and services incidental

thereto should no longer be regulated by R.M.P.R. 165 but instead should be regulated by "General Maximum Price Regulation." They are still so regulated by "General Maximum Price Regulation" and not by R.M.P.R. 165 as it now exists.

Petitioner D. M. Carothers assigns error in this petition to that part of the decree which required him to file the reports under Section 1499.102(c) of M.P.R. 165.

Section 1499.102 with its paragraphs (a), (b) and (c) is copied in full in the Appendix at the end of this petition and brief.

The granting of this relief was fundamentally erroneous for the following reasons:

(1) Section 1499.102(c) was abolished by the Administrator before the case was tried and it has never been in force at any time since.

(2) It was true, and admitted by the Administrator to be true that Carothers could not be required to file a report under Section 1499.102(c) or under any other section unless he was unable to compute the prices under Section 1499.102(a) or Section 1499.102(b) (see R. 7-8 and the particular sections of M. P. R. 165 as contained in the appendix). In order to secure an injunction requiring a filing under 1499.102(c) the burden rested on the Administrator to allege and prove that Carothers' maximum prices could not be determined under 1499.102(a) or 1499.102(b), and there was a total absence of any allegation, proof or finding of these essential facts.

(3) As an essential prerequisite to an order requiring Carothers to file in connection with any lots a re-

port under Section 1499.102(c) or under any other order of the Administrator, it was necessary to affirmatively establish that on said lots Carothers was furnishing and making charge for services in addition to space rental, since his charges were not subject to regulation by the Administrator unless they covered services as well as space rental. There was no allegation, proof or finding that services were being rendered in connection with the space rental and on the contrary it was alleged by the Administrator (R. 8-9), stipulated on the trial (R. 35) and found by the court (R. 41) that Carothers was merely renting space and furnishing no services whatever on the lots in question. There was therefore nothing in the record warranting the granting of the Administrator's prayer for the injunction requiring the filing of the reports.

(4) The only authority for injunctions contained in the Act is to be found in Section 205(a) which authorizes injunctions against acts or practices which constitute a violation of any provision of Section 4 of the Act, which last named section does not deal in any way with the records, reports or orders in connection therewith.

(5) Section 202 of the Act provides in detail how the Administrator is to secure any information which he deems necessary and proper to assist him in prescribing any regulation or order under the Act. This section provides for compulsory process of subpoena, requiring any and all persons to appear and give testimony before the Administrator and it guarantees immunity from prosecution and the infliction of pen-

alties in connection with any matter upon which the persons subpoenaed give evidence documentary or otherwise. The statutory method is exclusive and an attempt to coerce the giving of information by injunction without the protection provided by statute is unnecessary, unauthorized and highly oppressive.

While there is included in this same proceeding a suit against the partnership Allright Parking System, Limited, and its component members, such suit is distinct from that against D. M. Carothers individually. It involved a lot at 1014 Main Street, Dallas, Texas.

It was alleged by the Administrator (R. 8-9), stipulated on the trial (R. 35), and found by the court (R. 41) that at this lot in Dallas the operation of the partnership "consisted, and now consists of the mere furnishing of space for the parking of automobiles" with no service whatever.

The Emergency Court of Appeals has found in *Carothers et al. v. Bowles,* 148 Fed. (2d) 554, that M. P. R. 165 (now repealed) was valid as to parking only because it purported to cover the furnishing of space *plus services,* and that the "mere furnishing of space for the parking of automobiles" without services is not within the coverage of the Act.

In the case at bar it was stipulated on the trial that the Administrator had on May 31st, 1944, issued an order and opinion fixing and determining rates for the Dallas lot, providing a rate of 25c for all-day in-and-out and 15c for three hours or less. (R. 35.) It was not alleged or admitted that a charge of more than 15c had been made for three hours or less but it

was admitted that a charge of 35c had been made and received for all-day parking in this lot. (R. 36.)

The members composing the co-partnership Allright Parking System, Ltd. moved to dismiss the appeal of the Administrator as against them on the ground that the issues as to them had become moot since the only parking lot they operated was the one located in Dallas on which the lease had terminated and which had been operated at all times since May 1st, 1945, the date when the partnership lease terminated, by other parties in no wise connected with the Allright Parking System, Limited, or any of its members. The motion was duly verified and the facts therein alleged were not questioned by the Administrator (R. 54-56.) The Circuit Court of Appeals failed and refused to sustain this motion, which action was clearly erroneous, and is assigned as error in this petition.

Except as heretofore alleged the petitioners composing the co-partnership Allright Parking System, Limited, adopt the above statements as to petitioner D. M. Carothers, doing business as Allright Auto Park in connection with the errors assigned by them.

This Court Has Jurisdiction.

The basis on which it is contended that this court has jurisdiction to review the judgment or decree in question is that the case is a civil case in the United States Circuit Court of Appeals for the Fifth Circuit and jurisdiction is expressly conferred upon the Supreme Court by Judicial Code, Section 240,

amended (28 U. S. C. A. Section 347). The date of the judgment or decree sought to be reviewed is December 13th, 1945. (R. 66.) Petition for rehearing was filed in the United States Circuit Court of Appeals by the petitioners on January 3rd, 1946 (R. 67) and the petition for rehearing was denied by such Circuit Court of Appeals on January 10, 1946. (R. 86.)

Questions Presented.

The following questions are presented:

(1) Under Section 205(a) of the Emergency Price Control Act was the trial court authorized to issue an injunction against Carothers as to the ten lots when there was no showing that he had engaged or was about to engage in any act or practice in connection with those ten lots which constituted or would constitute a violation of Section 4 of said Act?

(2) If a person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of Section 4 of the Emergency Price Control Act is not the authority of the trial court under Section 205(a) of such Act confined to enjoining such act or practice?

(3) Was the trial court authorized to issue a blanket injunction, such as was sought by the Administrator in his prayers 2 and 4 against D. M. Carothers, doing business as Allright Auto Park?

(4) Was the trial court authorized to grant a blanket injunction such as was sought by the Administrator against the members of the partnership, Allright Parking System, Ltd.?

(5) Was the trial court required or authorized to issue the injunction sought by the Administrator in prayers Nos. 2 and 4 on the ground that, while it was not shown that Carothers had violated or was about to violate the order specifying the ceilings on the ten lots nevertheless he was subject to injunction because he had stated that he expected to appeal to the Emergency Court of Appeals for relief from that order?

(6) Was the order by which the Administrator attempted to fix ceilings on the ten Houston lots an order of general force and effect?

(7) Does the Emergency Price Control Act authorize the Administrator to fix maximum prices to be charged for commodities by orders which are not "of general force and effect?"

(8) Was the Circuit Court of Appeals in error in holding that while a trial court may refuse to issue an injunction restraining the violation of an administrative order establishing maximum prices it is error if the court so rules solely because it considers the order or regulation to be invalid, whether its validity is tested by constitutional requirement, by the grant of power in the statute or by modification made in that grant of power?

(9) Is a court of equity of the United States required to grant a mandatory injunction for the enforcement of an order which Congress has not authorized the Administrator to make?

(10) Since it was admitted that petitioners were merely furnishing space rental without any ser-

vices in connection therewith was the trial court authorized or required to issue any injunction such as was sought by the Administrator and denied by the trial court?

(11) If the Administrator sought a mandatory injunction requiring the filing of reports under 1499.102(c) of M. P. R. 165 and before the case was tried that provision was entirely abrogated by the Administrator and has never been in effect since, was the trial court authorized to issue the mandatory injunction to file such reports as prayed for?

(12) Could Carothers be required by injunction to file a report under 1499.102(c) of M. P. R. 165 without any proof that his prices could not be determined under 1499.102(a) or 1499.102(b) when 1499.102(c) expressly provided that it applied only where no price could be determined under 1499.102(a) or 1499.102(b)?

(13) Does Section 205(a) of the Act authorize injunctions requiring the filing of a report under Section 1499.102(c) of M. P. R. 165?

(14) Does Section 205(a) of the Act authorize the Administrator to secure information by injunction when Section 202 of the Act provides that he may secure such information by the compulsory process of subpoena and the party giving the information under subpoena is guaranteed immunity from prosecution and the infliction of penalties for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise?

(15) Should not the Circuit Court of Appeals have sustained the motion to dismiss the appeal as against the partnership when it was conclusively shown that the issues raised by such appeal were moot?

Reasons Relied on for Allowance of Writ.

(1) The United States Circuit Court of Appeals for the Fifth Circuit has held and decided in this case:

(a) That the judgment of the trial court to the extent that it denied injunctive relief to the Administrator should be reversed and the cause should be remanded to the trial court for further proceedings not inconsistent with the opinion.

(b) That although there was no evidence that D. M. Carothers, doing business as Allright Auto Park, had charged in excess of any alleged ceiling prices on any of the lots operated by him, or that he was about to do so, and although on the contrary, it was admitted that he was complying with all alleged ceilings and the trial court so found, the trial court nevertheless erred in so far as it refused to issue the injunction sought by the Administrator against Carothers.

(c) That, although the injunction sought by the Administrator and denied by the trial court was a general injunction in the very broadest of terms and in a form which has been vigorously condemned by the Supreme Court, nevertheless the trial court was in error in so far as it denied such injunction.

(d) That, although Section 205(a) of the Emergency Price Control Act clearly provides that any injunction issued thereunder must restrain the particular act or practice which the evidence shows the defendant has engaged in or is about to engage in, the trial court erred in denying the injunction as sought by the Administrator although that injunction was not confined to any particular act or acts or any particular practice or practices.

(e) That, although Congress has authorized the Administrator to fix ceilings on commodities only by orders of general force and effect (see 50 U. S. C. A. Appendix, Section 902(a)), and although the order on the Houston lots upon which the Administrator seeks the injunction is not an order "of general force and effect," nevertheless the trial court was in error in refusing to grant the injunction sought by the Administrator and denied by the trial court.

(f) That, although charges for space rental without any services in connection therewith are not subject to regulation by the Administrator under the terms of the Emergency Price Control Act, and although the Emergency Court of Appeals has so held, and although it was stipulated and established by uncontroverted evidence that petitioner Carothers was merely furnishing space rental for parking without other services, the trial court erred in denying the injunctive relief sought by the Administrator against Carothers and denied by the trial court.

(g) That, although Carothers had not engaged in any act or practice violating the price ceilings fixed by the Administrator on the Houston lots operated

by Carothers, and there was no evidence that he was about to do so, nevertheless, because he had expressed an intention of appealing to the Emergency Court of Appeals for administrative relief from the Administrator's order, the trial court was in error in denying the Administrator the injunctive relief sought against Carothers and denied by the trial court.

(h) That, although at the time of the trial in the trial court and at all times thereafter the regulation of services incident to storage had been transferred by the Administrator to "General Maximum Price Regulation" and had been removed from M. P. R. 165 and R. M. P. R. 165, nevertheless the trial court was in error in denying the Administrator an injunction requiring Carothers to comply in all respects with M. P. R. 165.

(i) That the trial court was in error in denying to the Administrator the injunctive relief sought by him against Scott, et al., composing the co-partnership Allright Parking System, Limited.

Each of the foregoing decisions and rulings of the United States Circuit Court of Appeals for the Fifth Circuit, from 1 (a) to 1 (i), inclusive, is erroneous and constitutes an error on the part of said Circuit Court of Appeals. In each of said decisions and rulings said Circuit Court of Appeals has decided an important question of Federal law, and has decided same in a way probably in conflict with applicable decisions of this court. If the important question of Federal law is one which has not in fact been decided by this court, it is a question which should be settled by this court. In each of such decisions and

rulngs said Circuit Court of Appeals has decided an important question of Federal law, and has decided same in a way probably in conflict with applicable decisions of this court. If the important question of Federal law is one which has not in fact been decided by this court, it is a question which should be settled by this court. In each of such decisions and rulings the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the trial court, as to call for an exercise of this court's power of supervision. The holding and decision of said Circuit Court of Appeals that the trial court was in error in denying an injunction in such general terms as sought by the Administrator is in conflict with the decision of this court in *New York N. H. & H. R. Company v. Interstate Commerce Commission,* 200 U. S. 361, and the various cases therein referred to. The Supreme Court has said in the case last cited that the issuance of an injunction of such general character would be a violation of the most elementary principles of justice and would announce a rule which would be destructive of fundamental liberties of the citizen. In so far as said rulings and decisions relate to the construction and application of Section 205(a) of the Emergency Price Control Act, said decisions and rulings are in conflict with the following cases decided by this court: *U. S. v. Babcock,* 250 U. S. 328; *Tennessee Coal, I. & R. Company v. George,* 233 U. S. 354; *Globe Newspaper Company v. Walker,* 210 U. S. 356 and *Fourth National Bank v. Francklyn,* 120 U. S. 747. These

cases hold that where a statute creates a right and provides an adequate remedy for the enforcement of that right, the remedy thus provided is exclusive and must be strictly pursued to the exclusion of all other remedies. In so far as these decisions and rulings of the Circuit Court of Appeals hold that the trial court could not deny the injunction on the ground that Congress had given to the Administrator no power to make the order upon which the injunction was sought, they are in conflict with the decisions of other Circuit Courts of Appeals on the same matter, to wit, the decisions in *Bowles v. Nu-Way Laundry Company,* 144 Fed. (2d) 741, 746, *Bowles v. Meyers,* 149 Fed. (2d) 440, and *U. S. v. Pepper Bros.,* 142 Fed. (2d) 340. In so far as the decisions and rulings of said Circuit Court of Appeals hold that mere furnishing of space rental for parking without any services is within the coverage of the Act, they are in conflict with the decision of the Emergency Court of Appeals in *Carothers et al. v. Bowles,* 148 Fed. (2d) 554, in which case the Emergency Court of Appeals held that renting of space for the parking of automobiles without the rendition of services is not within the coverage of the Act and not subject to price control. The holding of the Circuit Court of Appeals in this case that whether the business conducted by defendants came within the scope of the Emergency Price Control Act was a question where the jurisdiction of the Emergency Court of Appeals was exclusive, is in conflict with the decision of the Emergency Court of Appeals in *Marlene Linens v. Bowles,* 144 Fed. (2d) 874, in which case the Emergency

Court of Appeals held that its jurisdiction was confined to determining whether an order of the Administrator was valid.

(2) Said Circuit Court of Appeals has decided and held in this cause as follows:

(a) That the judgment of the trial court to the extent that it granted injunctive relief to the Administrator was proper and should be affirmed.

(b) That, although Section 1499.102(c) of M. P. R. 165 was abolished by the Administrator before the case was tried and has never been in force at any time since, the trial court did not err in ordering Carothers to file reports under that Section.

(c) That, although under 1499.102(c) no report was required to be filed unless the ceilings could not be determined under 1499.102(a) or 1499.102(b), and, although there was no proof whatever that ceilings could not have been determined under 1499.102(a) or 1499.102(b), the trial court did not err in ordering Carothers to file reports as prayed for under 1499.102(c).

(d) That, although Carothers was furnishing only space rental without any services, and it was so admitted, stipulated and found, and although there was no authority for the trial court to issue an injunction requiring him to file reports in accordance with the Administrator's prayer, nevertheless, the trial court did not commit error in ordering Carothers to file reports in accordance with the Administrator's prayer.

(e) That, although Section 202 of the Emergency Price Control Act provides in detail how the Admin-

istrator may secure any information he deems necessary or proper to assist him in prescribing any regulation or order under the Act, and although this Section provides for compulsory process of subpoena requiring any and all persons to appear and give testimony before the Administrator, and said Section guarantees immunity from prosecution and from the infliction of penalties for or on account of any transaction, matter or thing, concerning which the party subpoenaed may testify, or produce evidence, documentary or otherwise, before the Administrator, and although there is no statutory authority for coercing the giving of such information by injunction, the trial court nevertheless did not err in granting the relief sought by the Administrator as to the filing of such reports.

In each of the said decisions and rulings said Circuit Court of Appeals committed errors which are now assigned by petitioners, and each of them.

In rendering these decisions said Circuit Court of Appeals has decided important questions of Federal law, and has decided such questions in a way probably in conflict with the applicable decisions of this court. If these important questions of Federal law have not been decided and settled by this court, they should be settled by this court. In making such decisions and rulings said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as calls for an exercise of this court's power of supervision. In so far as said decision holds that Carothers can be re-

quired by injunction to file reports on his operations although it was stipulated, admitted and found that he was furnishing only space rental without any services, said decision is in conflict with the decision of the Emergency Court of Appeals in *Carothers et al. v. Bowles,* 148 Fed (2d). 554, in which case the Emergency Court of Appeals held that the rental of space for parking without services was not within the coverage of the Act and not subject to price control. The decision departs from the usual and customary course of judicial proceedings in so far as said decision holds that an injunction lies even though Section 202 of the Act (being the section which confers the right upon the Administrator to secure the information) provides in detail how the information is to be secured and provides that under the statutory method the party called upon to testify is to be given proper protection, the remedy provided by the Act being exclusive.

(3) In failing and refusing to grant the motion of Allright Parking System, Ltd., and its component members to dismiss the Administrator's appeal because the issues involved have become moot, the Circuit Court of Appeals committed error and rendered a decision in conflict with the decisions of other Circuit Courts of Appeals. (See *Wynne v. Union City Brewing Company,* 59 Fed. (2d) 733, *Wynne v. Harrison Brewing Company,* 59 Fed. (2d) 734), and has decided a Federal question in a way probably in conflict with applicable decisions of this court.

(4) The Supreme Court has decided many times that where the Government through any of its offi-

cers or agencies, seeks an injunction against the violation of a law, there must be a definite factual showing of illegality or else the injunction must be denied. *Appalachian Coals, Inc. v. United States,* 288 U. S. 344; *National Association of Window Glass Manufacturers v. U. S.,* 263 U. S. 403; and various other cases. To the same effect are the decisions of the Circuit Courts of Appeals. *U. S. v. A. T. & S. F. Railway Co.,* 142 Fed. 176; *Monarch Tobacco Works v. American Tobacco Company,* 565 Fed. 77. In this case the decision of the Circuit Court of Appeals is in conflict with these decisions. This court has provided by Rule 52 of the Rules of Civil Procedure that in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. It has also provided by the same rule that if there is any deficiency in the fact findings it is to be corrected on motion. In the case at bar, as we have heretofore pointed out, the facts proved did not entitle the Administrator to the injunctive relief he sought. The fact findings of the trial court did not entitle him thereto, and there was no effort made by the Administrator to have the trial court make findings of fact which would authorize the injunctive relief sought by him. These decisions of the Supreme Court constitute a great bulwark of protection to the citizens of this country. If they are disregarded it will necessarily lead to oppression.

WHEREFORE, your petitioners, and each of them, pray that a writ of certiorari may issue out of and

under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify this cause to this court for review and determination, as provided by the acts of Congress, and that your petitioners, and each of them, may have such other and further relief in the premises as to this court may seem appropriate and proper.

D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK.

SPENCER J. SCOTT, MORIN M. SCOTT, ATTORNEY IN FACT FOR SPENCER J. SCOTT, LEE PRICE AND D. M. CAROTHERS, A CO-PARTNERSHIP DOING BUSINESS AS ALLRIGHT PARKING SYSTEM, LTD.

By_____
D. M. CAROTHERS.

WALTER F. BROWN

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No.....

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945

D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, ET AL., *Petitioners,*

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, AND PAUL PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, SUCCESSOR IN OFFICE TO CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is reported in *Bowles, Price Administrator, v. Carothers, et al.,* and *Carothers et al. v. Bowles, Price Administrator,* 152 Fed. (2d) 603. This opinion is also set out in the record. (R. 58-65.)

Jurisdiction.

The basis on which it is contended that this court has jurisdiction to review the judgment or decree in

question is that the case is a civil case in the United States Circuit Court of Appeals for the Fifth Circuit and jurisdiction is expressly conferred upon the Supreme Court by judicial code, Section 240, amended (28 U.S.C.A. Section 347). The date of the judgment or decree sought to be reviewed is December 13th, 1945 (R. 66). Petition for rehearing was filed in the United States Circuit Court of Appeals by the petitioners on January 3rd, 1946 (R. 67) and the petition for rehearing was denied by such Circuit Court of Appeals on January 10, 1946 (R. 86).

Statement of the Case.

This has already been stated in the preceding petition under Statement of the Matter Involved (pages 2-27) and such statement is hereby adopted and made a part of this brief.

Specification of Assigned Errors Intended to Be Urged by D. M. Carothers, Doing Business as Allright Auto Park.

(1) The Circuit Court of Appeals erred in ordering and adjudging that the judgment of the trial court to the extent that it denied the Price Administrator injunctive relief be reversed and remanded for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals.

(2) The Circuit Court of Appeals erred in ordering and adjudging that the judgment of the trial court to the extent that it denied the Price Administrator injunctive relief be reversed and remanded for further proceedings not inconsistent with the opinion of

the Circuit Court of Appeals, the only injunctive relief sought by the Administrator against D. M. Carothers and denied by the trial court being as follows: "A permanent injunction against defendant D. M. Carothers, individually, restraining him from charging, demanding and receiving rates for parking services at any establishment now operated or that may hereafter be operated by him in excess of the maximum legal rates provided by Maximum Price Regulation No. 165" and "from violating Maximum Price Regulation No. 165 in any and all respects."

(3) The Circuit Court of Appeals erred in finding that it was admitted at the trial that D. M. Carothers, in violation of Section 102 (c) of Maximum Price Regulation No. 165, had failed to report prices being charged at eight of his lots in Houston.

(4) The Circuit Court of Appeals erred in holding that, while a court in the exercise of sound discretion may refuse to issue an injunction restraining the violation of an administrative order establishing maximum prices, it is error if the court so rules solely because it considers the order or regulation to be invalid, even though the Price Administrator has no authority granted by Congress or otherwise conferred upon him to make the order, and even though Congress has expressly denied him the power to make such order.

(5) The Circuit Court of Appeals erred in finding that the Administrator alleged and proved that while the rates fixed by the Administrator for the ten Houston lots operated by D. M. Carothers were being temporarily complied with, it was not an earnest

or willing compliance since Carothers intended to appeal to the Emergency Court for relief therefrom.

(6) The Circuit Court of Appeals erred in holding that under Section 205 (a) of the Emergency Price Control Act the trial court was in error in refusing to grant the blanket injunction sought by the Administrator against D. M. Carothers individually.

(7) The Circuit Court of Appeals erred in holding that under Section 205 (a) of the Emergency Price Control Act the trial court was in error to the extent that it denied the Administrator injunctive relief against D. M. Carothers, individually, even though there was no evidence that D. M. Carothers had engaged or was about to engage in any acts or practices which constituted or would constitute a violation of any provision of Section 4 of said Act, and even though the evidence showed and the court found that he was complying with all price ceilings on the lots referred to in the Administrator's complaint as being operated and controlled by him.

(8) The Circuit Court of Appeals erred in holding that because D. M. Carothers had stated that he intended to appeal to the Emergency Court of Appeals for relief from the order fixing ceilings on his Houston lots, his compliance was not an earnest or willing compliance, and, though there was no evidence that he had engaged or was about to engage in any act or practice which constituted or would constitute a violation of the maximum prices fixed by the Administrator, and though it was admitted by the parties and found by the court that he was complying with the

order fixing these maximum prices, nevertheless the trial court's judgment, to the extent that it denied the Administrator injunctive relief against D. M. Carothers, was erroneous.

(9) The Circuit Court of Appeals erred in affirming the judgment of the trial court to the extent that it granted injunctive relief to the Price Administrator, and in overruling the assignment of error wherein D. M. Carothers, doing business as Allright Auto Park, alleged that the trial court erred in directing him to file with the Harris County War Price and Rationing Board his schedule of prices on the premises located in Houston, Texas, and described in the judgment of the trial court.

Specification of Assigned Errors Intended to Be Urged by Allright Parking System, Limited, Composed of Spencer J. Scott, Morin M. Scott, Attorney in Fact for Spencer J. Scott, Lee Price and D. M. Carothers.

(1) The Circuit Court of Appeals erred in failing and refusing to dismiss the Administrator's appeal as against the partnership Allright Parking System, Limited, on the ground that the issues involved in such appeal had become moot.

(2) The Circuit Court of Appeals erred in ordering and adjudging that the judgment of the trial court to the extent that it denied the Price Administrator injunctive relief against said limited partnership and its component members be reversed and remanded for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals.

Argument.

The motion to dismiss the appeal of the Administrator in so far as it involves the Dallas lot and the limited co-partnership Allright Parking System, Ltd., and its component members, on the ground that the issues involved in such appeal had become moot before the case was reached in the Circuit Court of Appeals (R. 54-56) was well taken and should have been sustained. *Wynne v. Union City Brewing Company,* 59 Fed.2d 733; *Wynne v. Harrison Brewing Company,* 59 Fed.2d 734; *U. S. v. Aluminum Company of America,* 322 U. S. 716.

The trial court was clearly right in denying the injunctions prayed for in the Administrator's prayers 2 and 4. In *Carothers et al., v. Bowles,* 148 Fed.2d 554, the Emergency Court of Appeals said:

> "It may be conceded that one who merely rents a piece of ground to the owner of an automobile in order that the latter may store his car upon it, without more, is not engaged in rendering a storage service within the meaning of the Act, but is merely engaged in the renting of real estate."

It was stipulated on the trial before Judge Kennerly that Carothers was merely furnishing space rental without any services in connection therewith (R. 8-9); the court so found (R. 41); and this fact finding was not attacked. There was no basis in the pleadings, the evidence or the findings of fact for the rendition of any judgment other than a denial of these prayers, and the Circuit Court of Appeals erred in failing to so hold. The Emergency Court of Appeals

concurred with the trial court in this case in holding that "the mere furnishing of space for the parking of automotive vehicles" was not within the coverage of the Act.

For the same reason pointed out in the last preceding paragraph there was no error in the trial court's denial of the injunction against the partnership and the Dallas lot, and the Circuit Court of Appeals erred in failing to so hold.

The injunctions sought by the Administrator were general injunctions in the very broadest of terms (R. 13-14). Under no circumstances would it have been proper for the trial court to grant them and the Circuit Court of Appeals erred in failing to so hold. A case very much in point is *New York N. H. & H. R. Co. v. Interstate Commerce Commission,* 200 U. S. 361. This court says in said case that a defendant under such injunction would cease to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. Such an injunction, so this court says, would be a violation of the most elementary principles of justice and most destructive of the fundamental liberties of the citizen.

The following quotation is from 28 Amer. Jur. 473:

> "If the wrongs complained of and against which injunctive relief is sought are alleged violations of a statute in certain particulars, the decree may restrain the defendant from further like violations of the Act, but should not enjoin in general terms violations of the Act in the future in any particular, because an injunction of such general character would be violative of the ele-

> mentary principles of justice, in that it would compel the defendant thereafter to conduct himself and his business under the jeopardy of punishment for contempt for violating a general injunction."

See also 43 C. J. 760.

It seems to be well settled by the decisions of the Supreme Court that where a statute creates a right and provides an adequate remedy for the enforcement of that right, the remedy thus provided is exclusive and must be strictly pursued to the exclusion of all other remedies. *U. S. v. Babcock,* 250 U. S. 328; *Tennessee Coal, I. & R. Company v. George,* 233 U. S. 354; *Globe Newspaper Company v. Walker,* 210 U. S. 356 and *Fourth National Bank v. Francklyn,* 120 U. S. 747. The Emergency Price Control Act creates a new right to an injunction and specifies how that remedy may be secured. Section 205(a) of the Act. It provides clearly that the injunction cannot be granted except upon a showing by the Administrator that the defendant has engaged or is about to engage in some act or practice which constitutes or will constitute a violation of some provision of Section 4 of the Act. It would seem clear that no injunction can issue except upon such showing. However, in the case at bar there was no showing that Carothers had engaged in any act or practice which constituted or would constitute a violation of the alleged order fixing the maximum prices on the lots operated by him (R. 36, 43). And yet the Circuit Court of Appeals held that the trial court erred in denying the injunction prayed for. The Circuit Court of Appeals writes into the statute a

provision that not only must the defendant comply with an order but he must do it willingly or injunction will lie. The Circuit Court of Appeals was wholly without authority to enlarge the Act and create this qualification. The Circuit Court of Appeals also holds that if a seller of commodities thinks he is entitled to relief against an administrative order and he announces his intention of pursuing his statutory remedy, he thereby forfeits his right to conduct his business under the protection of the law and becomes subject to injunction under Section 205(a). Surely this construction is seriously erroneous and should not be permitted to stand. No such qualification is in the law and none can be added thereto by the court's decree. Surely a citizen cannot be penalized and visited with such dire consequences merely because he sees fit to take advantage of a right guaranteed by the Act. Furthermore, the Act is so worded that it clearly means that it limits the injunction to a restraint from engaging in the very acts or practice in which the defendant has engaged or is about to engage, and this section does not give the court a right to enjoin the defendant generally against future violations of the law or any code of regulations theretofore set up by the Administrator or thereafter to be set up or amended by him. These encroachments on the Act are fraught with such serious consequences that they clearly call for an exercise of this court's power of supervision.

The Act provides that every regulation or order dealing with commodities must be a regulation or order of general applicability and effect (50 U.S.C.A.

War Appendix Section 902). A distinction is made between commodities and rents, no such restriction being placed on the Administrator's power regarding rents. The reason for such differentiation is plain. The Administrator's order upon which he seeks the injunction against petitioner Carothers is clearly not an order of general force or efect (R. 15-17). The trial court was clearly authorized to decline to enjoin compliance with this unauthorized order. The Circuit Court of Appeals recognizes that under the rules laid down by the Supreme Court the trial court in the exercise of sound judicial discretion may refuse to issue an injunction restraining the violation of an administrative order establishing maximum prices, but it says that the trial court cannot do so solely because it considers the order or regulation to be invalid. It goes further and says in effect that this is true "whether such validity be tested by constitutional requirement, by the grant of power in the statute under which they are adopted or by modifications made in that grant of power." The court cites in support of that rule *Bowles v. Nu-Way Laundry Company,* 144 Fed. 2d 741, 746, and *Bowles v. Meyers,* 149 Fed. 2d 440. Neither of these cases is in point for they both expressly recognize that it is the province and the duty of the trial court to determine for itself whether the party sought to be enjoined is within the coverage of the Act, the only limitation being that it is not competent for the court to substitute its judgment for that of the Administrator as to the fairness or the equity of the regulation or price schedule. See also *U. S. v. Pepper Bros.,* 142 Fed.2d 340. So far as we

have been able to find the Supreme Court has never held that the fact that an administrative officer has usurped a power not conferred by statute is not a ground which can be considered by a District Court when a mandatory injunction is sought to enforce the void order. If there could be a stronger reason for refusing an injunction than the fact that the Administrator has no constitutional or statutory authority for making the order, it would be hard to conceive what the reason could be.

On June 30th, 1944, the Administrator filed his amended complaint in the court below asking for a mandatory injunction requiring the defendants to make and file certain computations under Section 1499.102(c) of Maximum Price Regulation No. 165 (R. 6-13). On the very next day, July 1st, 1944, the Administrator amended M.P.R. 165 and eliminated Section 1499.102(c) (7 F.R. 6430). On the 3rd day of July, 1944, the matter came on for hearing before the court (R. 35). On September 23, 1944, Judge Kennerly filed his findings and conclusions (R. 40-46), and on October 27th, 1944, he rendered his final judgment granting the mandatory injunction thus sought (R. 47).

The pertinent portions of "M.P.R. No. 165, as amended—services" are set out in the appendix attached to this petition and brief. The pertinent provisions of "R.M.P.R. 165, July 1st, 1944," which superseded the previous regulations are also set out in said appendix.

Obviously the defendant Carothers could not be mandatorily enjoined to make and file a computation

under a regulation in force when the complaint was filed but abolished and abrogated before the trial.

The Administrator admits in his complaint (R. 7-8) that if the defendant Carothers can determine his ceiling price under paragraph (a) or (b), there is no regulation requiring him to file any computation whatever, and that he cannot be required to file under 1499.102(c) unless the Administrator first establishes that the defendant Carothers cannot determine his prices under the previous sections.

A court cannot grant a mandatory injunction on the assumption that essential facts exist when there is no proof of existence thereof and no admission that they exist.

There was no admission, allegation or proof that defendant Carothers did not in March, 1942, supply the same service, if it was a service, as he is alleged to have supplied in 1944.

There is also no admission, allegation or proof that in March, 1942, the defendant Carothers was not using a rate or a pricing method to determine his prices, which rate or pricing method he was entitled to use under "R.M.P.R. 165, July 1, 1944."

There was no admission, allegation or proof that, if the defendant Carothers did not actually supply in March, 1942, the services, if any, that he is alleged to have supplied in 1944, he did not offer to supply such services, if any, in March, 1942, to a purchaser of the same class. There was no admission, allegation or proof that the defendant Carothers could not have determined the prices to be charged for the alleged services, if any, in 1944, by applying his highest March,

1942, charges to a purchaser of the same class which would, by the usual trade practice of defendant Carothers have been used by him had he supplied such services in March, 1942. There was no admission, allegation or proof that the defendant Carothers had no competitor with maximum prices for the same services to purchasers of the same class. There was, therefore, no basis whatever for the issuance of the mandatory injunction requested and issued.

In promulgating "R.M.P.R.165, July 1, 1944," the Administrator deleted not only Section 1499.102(c) but also Section 1499.122 prescribing the form 265.1 to be used in complying with Section 1499.102(c). (7 F. R. 6428 and 8 F. R. 7439, 7440.)

When the Administrator promulgated "R.M.P.R. 165, July 1, 1944" he not only deleted Section 1499.102 (c) of "M.P.R.R. 165, as amended—services," but he went further. In Section 1499.101(c) (4) of "M.P.R. 165, as amended" he provided that said last mentioned regulation should apply to services in connection with storage. In "R.M.P.R. 165, July 1, 1944" he expressly provided by Section 1 (d) (2) that storage services and services incident thereto should be excepted from "R.M.P.R. 165, July 1, 1944" and should be governed by the "General Maximum Price Regulation" (8 F. R. 7440).

Another reason why the injunction requiring the filing of reports under 1499.102(c) was error is this: Section 202 of the Act provides in detail how the Administrator is to secure any information which he deems necessary and proper to assist him in prescribing any regulation or order under the Act. This Sec-

tion provides for compulsory process of subpoena requiring any and all persons to appear and give testimony before the Administrator and it guarantees immunity from prosecution and infliction of penalties in connection with any matter upon which the persons subpoenaed give evidence, documentary or otherwise. The statutory method is exclusive and an attempt to coerce the giving of information by injunction without the protection provided by statute is unnecessary, unauthorized and highly oppressive. *United States v. Babcock,* 250 U. S. 328; *Tennessee Coal, I. & R. Company v. George,* 233 U. S. 354; *Globe Newspaper Company v. Walker,* 210 U. S. 356; and the *Fourth National Bank v. Francklyn,* 120 U. S. 747.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory power, by granting a writ of certiorari and thereafter reviewing and reversing the decree of the U. S. Circuit Court of Appeals for the Fifth Circuit in this case.

WALTER F. BROWN

DURELL CAROTHERS

ATTORNEYS FOR THE PETITIONERS, D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, AND SPENCER J. SCOTT, MORIN M. SCOTT, ATTORNEY IN FACT FOR SPENCER J. SCOTT, LEE PRICE AND D. M. CAROTHERS, COMPOSING THE CO-PARTNERSHIP ALLRIGHT PARKING SYSTEM, LIMITED.

APPENDIX

Copies of the pertinent portions of "Maximum Price Regulation No. 165, as amended—services" as same appear in 7 F. R. 648, et seq.

1499.101 Prohibition against dealing in services above maximum prices. On and after July 1, 1942, regardless of any contract or other obligation:

(a) Sales. No "person" shall "sell" or supply any of the "services" set forth in paragraph (c) of this section at a price higher than the maximum price permitted by this Maximum Price Regulation No. 165 as amended.

* * *

(c) Services covered. This Maximum Price Regulation No. 165, as amended shall apply to all rates and charges for the following services, except when such services are rendered as an employee.

* * *

(4) Automotive vehicles (including but not limited to automobiles, buses, motorcycles, semitrailers, tractors, trailers, and trucks—lubrication, maintenance, painting, rental, repair, storage (including but not limited to dead storage and parking), towing, washing or other servicing of (including but not limited to maintenance, rental or repair of accessories or parts such as batteries, radios, tires, or tubes, and including but not limited to pick-up and delivery and mounting and demounting of tires and use of loaned tires and tubes but not including retreading or recapping of tires or any service rendered in connection with a sale of tires or tubes or with the retreading or recapping of tires): Provided, That in the case of any of the foregoing services for which a charge is

authorized by any rationing order or rationing regulations issued by the Office of Price Administration, the maximum price hereunder shall be the highest price authorized by such rationing order or regulations.

* * *

1499.102 Maximum Prices for Services: General Provisions. Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller's maximum price for any service to which this Maximum Price Regulation No. 165, as amended, is applicable shall be:

(a) The highest price charged during March, 1942 (as defined in this section) by the seller—

(1) For the same service: or

(2) If no charge was made for the same service, for the similar service most nearly like it;

Provided, however, That if the seller in computing his prices during March, 1942, regularly used a rate or a "pricing method" including specific charges for particular items in the service rendered, the price resulting from proper application (i) of the highest such rate in effect during March, 1942, or (ii) of such pricing method, using the highest charges in effect during March, 1942, shall be deemed to be the highest price charged by the seller during that month for any service to which the rate or pricing method was then applicable or by usual trade practice would have been applicable had the service been offered in March, 1942, and shall be the seller's maximum price for any such service; Provided, further That a person engaged in commission selling, auctioneering, or the brokerage of commodities may continue to determine his maximum price by the use of the highest percentage rate he used during March, 1942, in connection with the sale

of the particular commodity, or, when the same or a similar commodity was not sold or purchased by him in March, 1942, he may use such highest percentage rate used in the same calendar month of 1941 as the month in which he is presently supplying the service; or

(b) If the seller's maximum price cannot be determined under paragraph (a), the maximum price of the "most closely competitive seller of the same class"—

(1) For the same service; or

(2) If such competitive seller has no maximum price for the same service, for the similar service most nearly like it; or

(c) If the seller's maximum price cannot be determined under paragraphs (a) or (b) of this section, a price determined by applying the rate, or the pricing method and charges, regularly used by the seller, for any other service or type of service, which he supplied during March, 1942, which price, however, shall not exceed a combination of the following items—

(1) An item for cost of direct labor used in supplying the service for which a price is sought, computed on a basis no higher than the highest wage rate which the seller had in effect for each type of employee during March, 1942, or if he had no wage rate in effect during such month, the highest wage rate which his competitors in the same area had in effect for each type of employee during March, 1942, plus

(2) An item for cost of materials used in supplying the service for which a price is being determined, computed on a basis no higher than the maximum prices, for purchase by the seller, established for such material by the Office of Price Administration, or if no maximum price has been established then the highest price which the seller, or a purchaser of the same class, had to pay for

such material in the month of March, 1942, plus

(3) The margin over such cost for direct labor and materials (i.e., subparagraph (1) plus subparagraph (2) equal, as a percentage of cost, to the average margin over direct labor and material cost which was figured on the service or type of service for which a price was charged by the seller during March, 1942, and which accounted for a greater portion of the seller's gross income from services than any other service during March, 1942, less

(4) All discounts and other allowances granted during March, 1942, to a purchaser of the same class.

Within ten days after determining the price under this paragraph the seller shall report such price to the "appropriate field office of the Office of Price Administration" upon Form No. 265:1. Such form shall be duly filled out in duplicate and may be copied from the form contained in Appendix A (1499.122) of this Maximum Price Regulation No. 165, as amended, or secured from the appropriate field office of the Office of Price Administration. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

R.M.P.R. 165

Copies of the pertinent portions of Part 1499 as included in R.M.P.R. 165, promulgated by the Administrator on July 1st, 1944. 8 F. R. 7439 et seq.

Maximum Price Regulation No. 165 as amended, services, is redesignated Revised Maximum Price Regulation No. 165 (Services) and is revised and amended to read as follows:

* * *

Section 1. Services covered. This regulation

covers the prices charged for all services except:

* * *

(d) The following services which remain under the General Maximum Price Regulation:

(1) Transportation services of contract carriers;

(2) Storage, warehousing and terminal services, and services incident thereto.

(3) The furnishing of electricity, gas, light, heat, power or water when the furnishing thereof is not subject to the requirements set forth in paragraph (c) of Revised Supplementary Regulation No. 11, 1499.46.

* * *

Sec. 4. General pricing provisions. In determining your maximum price, use the first of the following provisions which applies to you. Your maximum price shall be:

(a) The highest price at which you supplied the same service in March, 1942, to a purchaser of the same class. If, however, in March, 1942, you used a rate or a pricing method to determine your price, you may continue to use your highest March, 1942, rate or pricing method (using your highest March, 1942, charges) to determine your maximum price for the same service, to a purchaser of the same class.

(b) The highest price at which you offered to supply the same service for supply in March, 1942, to a purchaser of the same class, if you did not actually supply it in that month, or a price resulting from application of your highest March, 1942, rate or pricing method (using your highest March, 1942, charges to a purchaser of the same class) which would by your usual trade practice, have been used by you had you supplied the service in that month.

(c) The maximum price of your closest competitor for the same service to a purchaser of the

same class, if you did not actually supply it or offer it for supply in that month to any purchaser.

Sec. 5. Services which cannot be priced under section 4 (a). If you cannot determine a maximum price under section 4, you must file an application with the appropriate OPA district office for approval of a maximum price in line with the level of maximum prices otherwise established by this regulation. The application shall contain a description of the service, anticipated direct labor and material costs, and the proposed maximum price. It shall also contain a full explanation of the reasons why you cannot price this service under section 4. If you supplied any other service in March, 1942, submit, in addition, a description of the most comparable service showing your present direct labor and material costs for it and your present maximum price. You must also furnish any additional information which OPA may require.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1090

D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, ET AL., PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, AND PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, SUCCESSOR IN OFFICE TO CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on the preliminary injunction (R. 26–33) and its findings of fact and conclusions of law on the final injunction (R. 40–46), are not reported. The opinion of the circuit court of appeals (R. 57–63) is reported at 152 F. 2d 603.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 13, 1945 (R. 63–64), and the petition for rehearing was denied January 10, 1946 (R. 84). The petition for a writ of certiorari was filed on April 9, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the injunctive relief which the court below decided the trial court should have granted is unreasonably broad in scope because it restrains petitioner Carothers individually and the members of the partnership from violating the provisions of Maximum Price Regulation No. 165 at all of the parking lots operated by him or them, respectively, at the time of the trial or at any time thereafter.

2. Whether the court below erred in directing the trial court to enjoin petitioner Carothers individually from violating the provisions of Maximum Price Regulation No. 165 at the parking lots operated by him where no violations of the regulation had occurred, as well as at the parking lot operated by him and the other members of the partnership where violations of the regulation were admittedly taking place at the time of the trial.

3. Whether the district court, the circuit court of appeals, and this Court have jurisdiction in this proceeding to consider and determine the validity of price regulations and individual orders promulgated by the Price Administrator.

4. Whether Revised Maximum Price Regulation No. 165 of July 1, 1944, may be properly construed to except automobile storage services from its effective operation and to place the control of such services within the scope of the General Maximum Price Regulation.

5. Whether the court below erred in declining to dismiss the appeal with respect to the members of the partnership on the ground that the case had become moot as to them, the partnership having ceased to operate its parking lot in Dallas, Texas, during the time the appeal was pending.

6. Whether the injunction which was granted by the district court requiring petitioner Carothers to file, under Section 1499.102 (c) of Maximum Price Regulation No. 165, a list of prices with respect to the eight parking lots in Houston, is invalid on the grounds: (a) that Section 1499.102 (c) had been revoked prior to the trial; (b) that Section 1499.102 (c) was not shown to be applicable to petitioner Carothers' parking services; and (c) that Section 205 (a) of the Emergency Price Control Act does not authorize the issuance of a mandatory injunction directing the filing of a price report.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the applicable regulation are set forth in the Appendix, *infra*.

STATEMENT

This suit was instituted by the Price Administrator against all of the petitioners as co-partners and against petitioner Carothers individually, seeking to have them enjoined from violating the provisions of Maximum Price Regulation No. 165 in connection with the operation of their automobile parking lots situated in Dallas and Houston, Texas, and seeking a mandatory injunction requiring petitioner Carothers to file under Section 1499.102 (c) of that Regulation a list of prices in connection with the parking lots operated by him individually in Houston (R. 6–14).

Petitioners as co-partners operated one parking lot in Dallas, Texas, and petitioner Carothers operated individually eighteen such lots in Houston. The services rendered at these parking lots were of a special type, known as the "park and lock" plan. Under this plan each parking area is subdivided into spaces, each large enough to hold one car. The customer drives his car into one of the spaces, locks it, and retains the key, the car remaining there until reclaimed by the customer. There is a part-time cashier at each

parking lot, but no car attendant or watchman is present. The customer pays the cashier, or, in the cashier's absence, deposits the amount due in an envelope provided for the purpose, and drops the envelope in a locked receptacle. (R. 58.)

The parking lots involved may be divided into three groups:

(1) A single parking lot at Dallas, Texas, was operated by a partnership consisting of Carothers and the three other petitioners. Application was made to the District Director of the Office of Price Administration for a maximum price applicable to the services rendered at this lot, and from his determination an appeal was taken to the Price Administrator, who, on May 31, 1944, increased these prices. At the time of trial, these protest proceedings had been re-opened for the submission of further evidence. It was stipulated, and the district court found, that the prices established by the Price Administrator were being violated at the time of the trial. (R. 36, 43–44.) The partnership ceased operating this parking lot while the appeal from the judgment of the district court was pending.

(2) Ten parking lots in Houston, Texas, were operated by petitioner Carothers individually. As to these lots, pursuant to the preliminary injunction granted by the district court in the present case (R. 32), petitioner filed a report of his maximum prices as computed under Section

1499.102 (c) of Maximum Price Regulation No. 165. These prices were reduced by the Acting District Director (R. 15–17). It was stipulated, and the district court found, that petitioner Carothers was then abiding by this reduction order but that he intended to file an appeal with the Price Administrator concerning it. (R. 36, 43.)

(3) Eight other lots in Houston, Texas, were operated by petitioner Carothers, and it was stipulated, and the district court found, that petitioner had failed to file his computation of prices with respect to them under Section 1499.102 (c) of the Regulation (R. 35–37, 44–45).

The district court ordered the filing of prices with respect to the group of eight lots, but denied the other injunctive relief requested because the reopened protest proceedings were pending in the case of the Dallas lot and because petitioner Carothers intended to file an appeal with the Administrator in the case of the ten parking lots in Houston.

The circuit court of appeals affirmed the decision of the district court granting the mandatory injunction with respect to the eight parking lots in Houston, and reversed the decision of that court denying the other injunctive relief requested by the Administrator. The circuit court of appeals held that the denial of an injunction under

Section 205 (a) of the Emergency Price Control Act on the ground that the price regulation or order involved was invalid, or on the ground that a protest proceeding to test the validity of the regulation or order was pending, was inconsistent with the provisions of the Emergency Price Control Act and the policy of the Congress in enacting it; that the case had not become moot as to the members of the partnership because they had ceased operating the Dallas lot while the appeal was pending; that the past conduct of the petitioners showed that they were "not only engaged in violating [the Administrator's] orders, but were of one mind in their intent to continue such violation," which made future violations reasonably probable (R. 62); and that whether the petitioner's business was within the scope of, and subject to regulation under the Emergency Price Control Act was a question concerning the validity of the price regulation involved, which only the Emergency Court of Appeals could consider (R. 60). Subsequent to the trial but prior to the judgment of the court below, the Emergency Court of Appeals in the case of *Carothers* v. *Bowles,* 148 F. 2d 554, certiorari denied, 325 U. S. 875, sustained the validity of Maximum Price Regulation No. 165 as applied to the parking lot operated by the partnership in Dallas, Texas.

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ARGUMENT

I

In the circumstances of this case, the injunctive relief which the circuit court below decided should have been granted was not unreasonably broad in its geographical reach. The past conduct of petitioner Carothers and his partners at the Dallas lot was one of flagrant noncompliance, and this conduct was continued even while the case was being tried (R. 36; 43–44). Petitioner Carothers' failure to file prices as to the eight Houston lots (R. 37, 45) showed a like obstinate disinclination on his part to comply with the regulation.[1] As the court below well stated, "it is the conduct of the defendants, and not the locale of their conduct, which is important." (R. 63.) If a defendant's conduct is such as to make the occurrence of future violations likely, unless the injunction be issued, it is clearly proper that the restraint should be operative at whatever geographical location the defendant may exercise control over a business. An injunction limited in its operation to one business location or to one city might be rendered completely nugatory by the simple device of shifting the place of business.

[1] These circumstances and the fact that petitioner expected to contest the order applicable to eight of the Houston lots rightly made the court below conclude that the stipulated compliance at the other ten Houston lots was "not an earnest or willing compliance", and hence not likely to continue.

Accordingly, it was not improper to grant the requested relief against violations at any of the parking lots which were then operated or which might thereafter be operated by petitioners. Hence, there was no need of showing, as petitioners contend (Br., p. 8), that violations had occurred at the ten Houston lots in order to obtain injunctive relief against violations at those lots.

Further, the injunctive relief which the court below decided should be granted was not too broad with respect to the nature of the violations restrained. Petitioners assert (Br., p. 7) that the injunction here was "in the very broadest of terms", and they invoke the principle that the decree may restrain the defendant from further like violations of the Act, but "should not enjoin in general terms violations of the Act in the future in any particular." The general rule announced by this Court is that the breadth of injunctive relief to be granted must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to the unlawful acts found to have been committed in the past. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437. In the case at bar flagrant violations of both the price control and report filing provisions of Maximum Price Regulation No. 165 had occurred, and they are the only substantive provisions contained in that regulation. Consequently, the violations

against which the injunction involved here can operate in the future can only be violations identical with, or similar to, those which had occurred prior to the trial. And there was ample justification for the conclusion that future violations might reasonably be anticipated from the course of petitioners' conduct in the past. Injunctions as broad as, or broader than the injunction granted herein, have been granted under the Price Control Act, and have been upheld. *Bowles* v. *Montgomery Ward & Co.,* 143 F. 2d 38 (C. C. A. 7); *Bowles* v. *May Hardwood Co.,* 140 F. 2d 914 (C. C. A. 6); *Bowles* v. *Leithold* (C. C. A. 3), not yet reported, certiorari denied March 25, 1946, No. 826 at the present Term.

II

Petitioners assert that the Price Administrator has no authority under the Emergency Price Control Act to regulate prices charged for parking in lots operated on the "park-and-lock" plan, and that Maximum Price Regulation No. 165 is invalid as applied to them. They also contend that the order fixing prices for parking in the ten lots operated by petitioner Carothers in Houston, is invalid because it is not an order of general force and effect. The court below properly held that these questions concerned the validity of the regulation and order under the statute, and that the determination of those issues was within the exclusive initial jurisdiction of the

Emergency Court of Appeals. See *Bowles* v. *Willingham,* 321 U. S. 503, 509–10, 521; *Lockerty* v. *Phillips,* 319 U. S. 182; *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410; *Case* v. *Bowles, et al.,* No. 261 at the present Term, decided February 4, 1946; *Bowles* v. *American Brewery Inc.,* 146 F. 2d 842, 845 (C. C. A. 4); *Rosensweig* v. *United States,* 144 F. 2d 30, 33 (C. C. A. 9), certiorari denied, 323 U. S. 764. The Emergency Court of Appeals has, without question, exercised jurisdiction under Section 204 (d) to determine the validity of orders fixing specific prices in individual cases. *Gold-Form, Inc.* v. *Bowles,* 152 F. 2d 107; *Saunders Petroleum Co.* v. *Bowles,* 152 F. 2d 112; *Buckley, Dement & Co.* v. *Bowles,* 143 Fed. 877. And, as previously stated herein, *supra,* p. 7, the Emergency Court of Appeals has upheld the validity of Maximum Price Regulation No. 165 as applied to the parking lot operated in Dallas under the "park and lock" plan by the partnership. *Carothers* v. *Bowles,* 148 F. 2d 554, certiorari denied, 325 U. S. 875. Petitioners' vain attempt to torture the decision rendered squarely against them in that case into a ruling in their favor by lifting one sentence from the context of the opinion is obviously not faithworthy.

III

Petitioners also claim that the granting of injunctive relief against violations of Maximum Price Regulation No. 165 was improper because

the regulation of prices for storage services was transferred by Revised Maximum Price Regulation No. 165 to the General Maximum Price Regulation. It is argued (Br., p. 13) that in Revised Maximum Price Regulation 165 it was "expressly provided by Section 1 (d) (2) that storage services and services incident thereto should be excepted from 'R. M. P. R. 165, July 1, 1944' and should be governed by the 'General Maximum Price Regulation.'" This is a gross misreading of Revised Maximum Price Regulation No. 165, *infra,* pp. 29–30, which at the time the district court entered its judgment, provided in Section 1: "This regulation covers all services previously covered by Maximum Price Regulation No. 165 as amended, Services * * *." A subsequent reference to the General Maximum Price Regulation was, as indicated in the margin, merely to show that certain storage services which ***had been*** subject to the latter Regulation would continue to be subject thereto.[2]

---

[2] Section 1 of R. M. P. R. 165 provided, following the sentence above-quoted: "It also covers all other services except: * * * (d) The following services which *remain under* the General Maximum Price Regulation: (1) transportation services of contract carriers; (2) storage, warehousing and terminal services, and services incident thereto; (3) the furnishing of electricity, gas, light, heat, power or water when the furnishing thereof is not subject to the requirements set forth in paragraph (c) of Revised Supplementary Regulation No. 11, § 1499.46." [Italics supplied.]

IV

The partnership having ceased operating the parking lot in Dallas while the appeal was pending, petitioners contend that the case became moot as to the members of the partnership. The court below correctly rejected this contention. The factual situation here is somewhat analogous to that involved in *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290,[3] and the case should be governed by the principles announced therein by this Court. At page 309 the Court said:

> The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. * * *
>
> * * * there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court * * *. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.

[3] Cf. *Walling* v. *Reuter Co.*, 321 U. S. 671.

V

Petitioners contend on various grounds that the mandatory injunction granted by the district court and affirmed by the court below, requiring petitioner Carothers to file a list of prices under Section 1499.102 (c) of Maximum Price Regulation No. 165, *infra*, p. 27, was improperly granted.

The contention that the revocation of Section 1499.102 (c) and the substitution of a somewhat different reporting requirement just prior to the trial, rendered the granting of the injunction improper, is without merit. The reporting by petitioner Carothers of a computation of his prices pursuant to that subsection for a period when the subsection was effective would be relevant to possible future action by the Administrator notwithstanding the revocation of the subsection prior to the making of the report. Thus, the Administrator might have need of the report when considering the advisability of bringing an action for damages based on excessive charges made during the period when the particular regulation was operative; and the regulation remains in force and effect for that purpose. See *United States* v. *Hark*, 320 U. S. 531, 536.

Petitioners' further contention that the record does not show the applicability of Section 1499.102 (c), *infra*, pp. 26–28, is equally untenable. Subsection (c) of Section 1499.102 is applicable only

if both subsections (a) and (b), *infra*, pp. 25–26, are inapplicable. If petitioner Carothers did not furnish the same or similar parking service in March, 1942, as he did under the "park and lock" plan, subsection (a) is inapplicable. The record shows that the parking service furnished by him in March, 1942, differed from the "park and lock" service furnished at the time of the trial (R. 8, 19). Thus, subsection (a) is inapplicable. If petitioner Carothers has no competitive sellers of the same class, subsection (b) is also inapplicable, and subsection (c), by its terms, becomes applicable. The record shows that a preliminary injunction was entered against him requiring him to file a report as to ten of the Houston parking lots (R. 32–33). We do not believe that it would be proper to assume that petitioner Carothers would have silently permitted the final injunction to be entered against him as to the eight lots (R. 34–46) if prices computed under either subsection (a) or (b) would have been beneficial to him, especially since the facts necessary to show the applicability of either (a) or (b) were peculiarly within his own knowledge. We believe that petitioners' contention should be resolved by the application of the principle that a defendant may not, while remaining silent as to material facts peculiarly within his own knowledge, object to the plaintiff's failure to supply that evidence. See, e. g., *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–

154; *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 225–226.

Finally, the argument that Section 205 (a) of the Emergency Price Control Act does not authorize the granting of a mandatory injunction requiring the filing of a price report, upon the ground that Section 202, *infra,* pp. 21–22, provides the exclusive means of obtaining information under that Act, is without substance. Section 205 (a), *infra,* pp. 23–24, plainly authorizes the granting of a mandatory order to enforce compliance with the provisions of Section 4 (a) of the Act, *infra,* p. 21. Section 4 (a) makes it unlawful to omit to do any act in violation of any requirement or order issued under Section 202 (b). Obviously, the reporting requirements of Maximum price Regulation No. 165 are issued under Section 202 (b), *infra,* pp. 21–22. And there is nothing in the Act to indicate that it was the intention of the Congress to make the subpoena procedure provided for in Section 202 the exclusive procedure to be followed by the Administrator in obtaining information under the Act. The fact that the Congress provided two methods by which information may be obtained does not mean that one must be used to the exclusion of the other. The two modes of securing information are cumulative and not alternative. Cf. *Collins* v. *Porter,* No. 393, at the present Term, decided April 22, 1946.

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and no question of large public importance is involved. The petition should be denied.

Respectfully submitted,

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MAY 1946.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, as amended, (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App. Supp. IV, 901 et seq.).

Section 2 (a):

> Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general ap-

plicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided,* That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee

shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

Section 2 (c):

Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *

Section 4 (a):

It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 202 (a):

The Administrator is authorized to make such studies and investigations, *to conduct such hearings,* and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

Section 202 (b):

The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may

require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

Section 202 (c):

For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

Section 202 (g):

No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

Section 204 (d):

Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as

provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 205 (a):

Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage

in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

Pertinent provisons of "Maximum Price Regulation 165, as amended—Services" (7 F. R. 6428, 8239, 8798, 8948, 9343):

Section 1499.101:

Prohibition against dealing in services above maximum prices. On and after July 1, 1942, regardless of any contract or other obligation:

(*a*) Sales. No "person" shall "sell" or supply any of the "services" set forth in paragraph (c) of this section at a price higher than the maximum price permitted by this Maximum Price Regulation No. 165 as amended.

* * * * *

(*c*) Services Covered. This Maximum Price Regulation No. 165 as amended shall apply to all rates and charges for the following services, except when such services are rendered as an employee:

* * * * *

(4) Automotive vehicles (including but not limited to automobiles, buses, motorcycles, semi-trailers, tractors, trailers, and trucks—lubrication, maintenance, painting, rental, repair, storage (including but not limited to dead storage and parking), towing, washing or other servicing of (including but not limited to maintenance, rental or repair of accessories or parts such as batteries, radios, tires, or tubes, and including but not limited to pick-up and delivery and mounting and demounting of tires and

use of loaned tires and tubes but not including retreading or recapping of tires or any service rendered in connection with a sale of tires or tubes or with the retreading or recapping of tires): Provided, That in the case of any of the foregoing services for which a charge is authorized by any rationing order or rationing regulations issued by the Office of Price Administration, the maximum price hereunder shall be the highest price authorized by such rationing order or regulations.

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Section 1499.102:

Maximum Prices for Services: General Provisions. Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller's maximum price for any service to which this Maximum Price Regulation No. 165, as amended, is applicable shall be:

(*a*) The highest price charged during March, 1942 (as defined in this section) by the seller—

(1) For the same service; or

(2) If no charge was made for the same service, for the similar service most nearly like it;

Provided, however, That if the seller in computing his prices during March, 1942, regularly used a rate or a "pricing method" including specific charges for particular items in the service rendered, the price resulting from proper application (i) of the highest such rate in effect during March, 1942, or (ii) of such pricing method, using the highest charges in effect during March, 1942, shall be deemed to be the highest price charged by the seller during that month for any service to which the rate or pricing method was then ap-

plicable or by usual trade practice would have been applicable had the service been offered in March, 1942, and shall be the seller's maximum price for any such service; *Provided, further* That a person engaged in commission selling, auctioneering, or the brokerage of commodities may continue to determine his maximum price by the use of the highest percentage rate he used during March, 1942, in connection with the sale of the particular commodity, or, when the same or a similar commodity was not sold or purchased by him in March, 1942, he may use such highest percentage rate used in the same calendar month of 1941 as the month in which he is presently supplying the service; or

(*b*) If the seller's maximum price cannot be determined under paragraph (a), the maximum price of the "most closely competitive seller of the same class"—

(1) For the same service; or

(2) If such competitive seller has no maximum price for the same service, for the similar service most nearly like it; or

(*c*) If the seller's maximum price cannot be determined under paragraphs (a) or (b) of this section, a price determined by applying the rate, or the pricing method and charges, regularly used by the seller, for any other service or type of service, which he supplied during March, 1942, which price, however, shall not exceed a combination of the following items—

(1) An item for cost of direct labor used in supplying the service for which a price is sought, computed on a basis no higher than the highest wage rate which the seller had in effect for each type of employee during March, 1942, or if he had

no wage rate in effect during such month, the highest wage rate which his competitors in the same area had in effect for each type of employee during March, 1942, plus

(2) An item for cost of materials used in supplying the service for which a price is being determined, computed on a basis no higher than the maximum prices, for purchase by the seller, established for such material by the Office of Price Administration, or if no maximum price has been established then the highest price which the seller, or a purchaser of the same class, had to pay for such material in the month of March, 1942, plus

(3) The margin over such cost for direct labor and materials (i. e., subparagraph (1) plus subparagraph (2) equals, as a percentage of cost, to the average margin over direct labor and material cost which was figured on the service or type of service for which a price was charged by the seller during March, 1942, and which accounted for a greater portion of the seller's gross income from services than any other service during March, 1942, less

(4) All discounts and other allowances granted during March, 1942, to a purchaser of the same class.

Within ten days after determining the price under this paragraph the seller shall report such price to the "appropriate field office of the Office of Price Administration" upon Form No. 265:1. Such form shall be duly filled out in duplicate and may be copied from the form contained in Appendix A (1499.122) of this Maximum Price Regulation No. 165, as amended, or secured from the appropriate field office of the Office of Price Administration. The price so

reported shall be subject to adjustment at any time by the Office of Price Administration.

(d) If the seller did not supply any service during March 1942, and if the service to be priced is not the same as or similar to any service supplied during that month by a competitive seller of the same class, and if such service cannot be priced under Sec. 1499.103 of this Maximum Price Regulation No. 165, as amended, a price approved by the Office of Price Administration. Application for such approval shall be made on Form 265:3 contained in Appendix C (§ 1499.124) of this Maximum Price Regulation No. 165, as amended, and shall be filed in duplicate with the appropriate field office of the Office of Price Administration. The application shall contain (1) 'an appropriate description and identification' of the service for which a price is being reported; (2) a statement of the reasons why it cannot be priced except under this paragraph (d); and (3) a statement of the proposed maximum price, setting forth separately the amount included for labor, the amount for materials, and the amount for overhead and profit. Unless the Office of Price Administration or an authorized representative thereof shall, by order mailed to the applicant within 10 days from the date of filing the application, disapprove the maximum price as reported, such price shall be deemed to have been approved, subject to disapproval or adjustment at any time by the Office of Price Administration.

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Pertinent provisions of "Revised Maximum Price Regulation No. 165 (Services)" (9 F. R. 7439, 11,173)

Section 1. Services covered. This regulation covers all services previously covered by Maximum Price Regulation No. 165 as amended, Services. It also covers * * *:

Section 4. General pricing provisions. In determining your maximum price, use the first of the following provisions which applies to you. Your maximum price shall be:

(a) The highest price at which you supplied the same service in March, 1942, to a purchaser of the same class. If, however, in March, 1942, you used a rate or a pricing method to determine your price, you may continue to use your highest March, 1942, rate or pricing method (using your highest March, 1942, charges) to determine your maximum price for the same service, to a purchaser of the same class.

(b) The highest price at which you offered to supply the same service for supply in March, 1942, to a purchaser of the same class, if you did not actually supply it in that month, or a price resulting from application of your highest March, 1942, rate or pricing method (using your highest March, 1942, charges to a purchaser of the same class) which would, by your usual trade practice, have been used by you had you supplied the service in that month.

(c) The maximum price of your closest competitor for the same service to a purchaser of the same class, if you did not actually supply it or offer it for supply in March 1942 to any purchaser. However, you may not take your closest competitor's maximum price if such price is based on his offering price.

Section 5. Services which cannot be priced under section 4. (a) If you cannot determine a maximum price under section 4, you must file an application with the appropriate OPA district office for approval of a maximum price in line with the level of maximum prices otherwise established by this regulation. The application shall contain a description of the service, anticipated direct labor and material costs, and the proposed maximum price. It shall also contain a full explanation of the reasons why you cannot price this service under section 4. If you supplied any other service in March, 1942, submit, in addition, a description of the most comparable service showing your present direct labor and material costs for it and your present maximum price. You must also furnish any additional information which OPA may require.

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